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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. [redacted]90

BENJAMIN KORNBLUTH, ABE KORNBLUTH and PHILIP CANTOR, copartners doing business under the firm name and style of HUDSON TEXTILE CO.,

Petitioners,

vs.

THE NATIONAL CITY BANK OF NEW YORK and FEDERAL RESERVE BANK OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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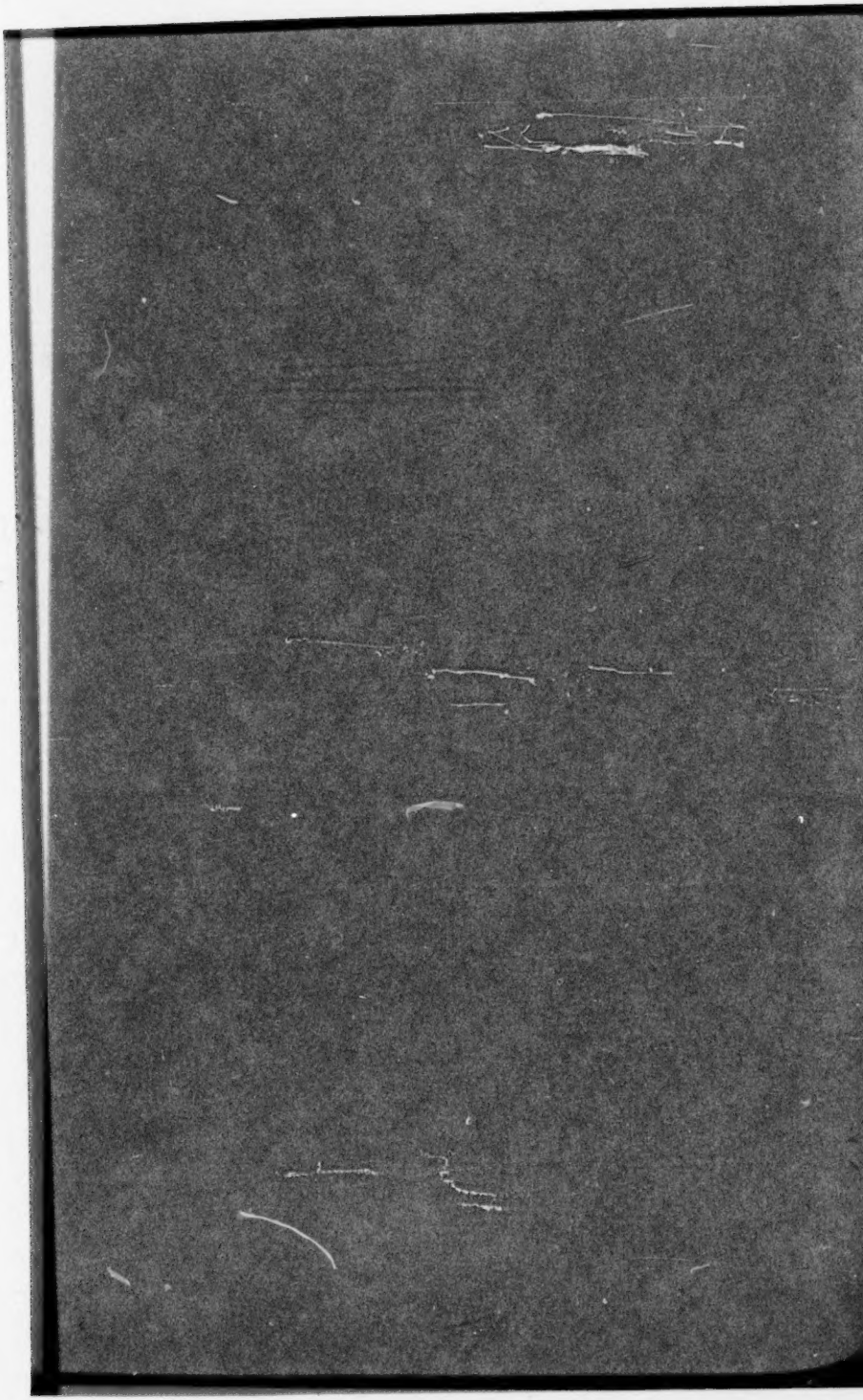

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT	2
1. Plaintiffs' cause of action against the National City Bank of New York, respondent, defendant below	2
2. Plaintiffs' transaction with the corporation, "Richard Dye Works, Inc."	3
3. Richard Dye Works, Inc. was never incorporated and had neither de jure nor de facto existence and was non-existent	4
4. The proceedings below	5
QUESTIONS PRESENTED	10
REASONS FOR GRANTING THE WRIT	10
POINT I—The Court of Appeals lacked jurisdiction and authority to direct the District Court to dismiss plaintiffs' complaint on the appeal by the National City Bank	12
POINT II—The Court of Appeals lacked jurisdiction and authority to direct the District Court to dismiss plaintiffs' complaint on the appeal by the Federal Reserve Bank from the order denying its motion for summary judgment. Such an order is not a final decision and is not appealable under 28 U. S. C. Sec. 1291	13

PAGE

POINT III—The Court of Appeals exceeded its appellate office under Rule 56, Federal Rules of Civil Procedure, in directing the District Court to enter summary judgment to dismiss plaintiffs' complaint, since there is a genuine dispute of material fact ... 14

A The affidavit of plaintiff Cassell who represented the plaintiffs in this transaction ... 15

B The documentary evidence ... 17

C The depositions ... 17

POINT IV—The Court of Appeals refused to follow the well settled law of Pennsylvania, namely, that the obligation of a bank to its depositor in honoring a check made to the order of a person named therein is to pay only to that payee or according to his order on a genuine endorsement ... 21

A The check herein is not a bearer check. Plaintiffs made check payable to the corporate entity, "Richard Dye Works, Inc." in the belief that it was in existence ... 21

B The absolute duty of the National City Bank was to pay the check only to the corporate entity, "Richard Dye Works, Inc.", or according to its order on a genuine endorsement and to no one else ... 22

C The Court below erroneously applied the so-called "imposter" cases which have absolutely no application herein ... 24

D There could not be any ratification of any act by the *corporate entity,* "Richard Dye Works, Inc.", since it never was incorporated ... 26

PAGE

E Plaintiffs suffered damage by the wrongful payment of the check and the wrongful charging of plaintiffs' account therewith by the National City Bank 27

CONCLUSION 30

APPENDIX: Text of Statutes Relied On 1

Title 28 U. S. C. 1

Sec. 1291 1

Sec. 1652 1

Federal Rules of Civil Procedure:

Rule 56 1

Rule 56(a) 1

Rule 56(b) 1

Rule 56(c) 2

Title 15 Pennsylvania Statutes, Business Corporation Law 2

Sec. 2852-206(a) 2

Title 56 Pennsylvania Statutes, Negotiable Instruments Law 3

Sec. 14(3) 3

Sec. 28 3

TABLE OF CASES

PAGE

Alent v. Bank of the United States, 131 Misc. 370, 226 N. Y. S. 653 ..... 26, 27

Atlantic Co. v. Citizens Ice & Cold Storage Co., 178 F. 2d 453 (C. C. A. 5) 14

Bacher v. City Nat. Bank, 31 A. 2d 725, 347 Pa. 80 22

Callaway v. Hamilton National Bank of Washington, et al., 195 F. 2d 556 (C. C. A. D. C., 1952) 23, 26, 27, 29

City Bank v. Hamilton Nat. Bank of Washington, 108 F. 2d 588 25

Commonwealth v. Globe Ind. Co., 185 A. 796, 323 Pa. 261 ..... 22, 25

Doehler Metal Furniture Co. v. United States, 149 F. 2d 130 (C. C. A. 2) 15

Drittel v. Friedman, 154 F. 2d 653 (C. C. A. 2) 14

Dutton, et al. v. Citizens Service Defense Corp., 197 F. 2d 458 (C. C. A. 8) 14

Fountain v. Filson, et ux, 336 U. S. 681 (1949) 10, 11, 13, 14, 15, 20

Gibbs Estate, In re, 27 A. 383 (Penn.) 5

Huddleston v. Dwyer, 322 U. S. 232 ..... 9, 10, 11, 21

International Aircraft Trading Co. v. Manufacturers Trust Co., 297 N. Y. 285, 79 N. E. 2d 249 (1948) 23, 24, 26, 27, 29

King v. Order of United Commercial Travelers of America, 332 U. S. 754 21

Land Title Bank & Trust Co. v. Cheltenham Nat. Bank, 66 A. 2d 768, 362 Pa. 30 (1949) 8, 9, 11, 22, 24

PAGE

Land Title & Trust Co. v. Northwestern Nat. Bank, 46 A. 420, 196 Pa. 230 ..... 24, 26

Main Belting Co. v. Corn Exchange Nat. Bank & Trust Co., 188 A. 865, 325 Pa. 168 (1937) 22, 23

Shank v. People State Bank, 104 Ind. 443, 7 N. E. 2d 46 ..... 27, 28

Truveale v. Blumberg, et al., 8 F. R. D. 492 12

United Security Life Ins. Co. of Pennsylvania v. Central Nat. Bank, 40 A. 97, 185 Pa. 586 ..... 22, 23

TABLE OF STATUTES

Title 15 Pennsylvania Statutes, Business Corporation Law, Sec. 2852-206 ..... 2, 4
App. 2

Title 56 Pennsylvania Statutes, Negotiable Instruments Law:

Sec. 14(3) 2, 22
App. 3

Sec. 28 ..... 2, 7
App. 3

Federal Rules of Civil Procedure:

Rule 56 ..... 2, 6, 10, 11, 12, 14, 15
App. 1-2

Rule 56(a) 12
App. 1

Rule 56(b) 12
App. 1-2

PAGE

Rule 56(c) 10, 12, 14, 20
App. 2

12 U. S. C. Sec. 632 5

28 U. S. C. Sec. 1254(1) 2

28 U. S. C. Sec. 1291-1294 ..... 2, 10, 11, 13, 14
Sec. 1291 ..... App. 1

28 U. S. C. Sec. 1446 5

28 U. S. C. Sec. 1652 ..... 2, 9, 10, 11, 21
App. 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. .....

EMANUEL KUSHELEWITZ, ABE KUSHELEWITZ and PHILIP CASSELL, copartners doing business under the firm name and style of ELKAY TEXTILE CO.,

Petitioners,

vs.

THE NATIONAL CITY BANK OF NEW YORK and FEDERAL RESERVE BANK OF NEW YORK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Emanuel Kushelewitz, Abe Kushelewitz and Philip Cassell, copartners doing business under the firm name and style of Elkay Textile Co., plaintiffs below, pray that a writ of certiorari issue to review (a) the judgment of the United States Court of Appeals for the Second Circuit entered on March 4, 1953, and (b) that Court's order of March 30, 1953 denying their petition for rehearing.

Opinions Below

The opinion of the District Court (R. 74a-77a) granting summary judgment in favor of the plaintiffs, and the opin-

ion of the Court of Appeals (R. 88-91) reversing the judgment of the District Court and remanding the case with directions to the District Court to dismiss plaintiffs' complaint have not yet been reported. A per curiam opinion (R. 118) denying the plaintiffs' petition for rehearing has not yet been reported.

Jurisdiction

The Court of Appeals judgment was entered on March 4, 1953 (R. 92). Thereafter on March 30, 1953, plaintiffs' petition for rehearing, duly filed, was denied (R. 118).

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254 (1).

Statutes Involved

The statutes relied upon are Federal Rules Civil Procedure, Rule 56; Title 28 U. S. C. Secs. 1291 and 1652; Pennsylvania Statutes, Title 15 Business Corporation Law Sec. 2852-206, and Title 56 Negotiable Instruments Law Secs. 14 and 28; the pertinent provisions thereof are reprinted in the appendix.

Statement

1. *Plaintiffs' cause of action against the National City Bank of New York, respondent, defendant below.* Plaintiffs maintained a checking account with the National City Bank of New York. On September 15, 1950, at Jermyn, Pennsylvania, plaintiffs drew their check (Ex. "B", photostatic copy R. 48a) on that bank account in New York for $1,500 payable to the *corporation,* "Richard Dye Works, Inc.". The plaintiffs drew said check under the belief that the *corporation,* "Richard Dye Works, Inc.", was an exist-

ing corporation (R. 24a-26a). In truth and fact, unknown to plaintiffs, the *corporation,* "Richard Dye Works, Inc.", never was incorporated and never had de jure nor de facto existence and was non-existent. This check was in the nature of a loan to the *corporation,* "Richard Dye Works, Inc.", which had been solicited by one Adams, "president" of said corporation on behalf of said corporation (R. 24a-25a). The National City Bank deducted that amount from plaintiffs' account after the check had been received in the course of business from the Federal Reserve Bank of New York, third-party defendant below, who had in turn received it from First National Bank, Jermyn, Pennsylvania, with the endorsement "Richard Dye Works". The Jermyn Bank and the Federal Reserve Bank guaranteed prior endorsements.

This action was brought by the plaintiffs against the National City Bank to recover the $1,500 wrongfully deducted from their account. This action is based on *breach of contract* in that the said *Bank did not pay the check in accordance with the order of the plaintiffs* to the payee named, the *corporation,* "Richard Dye Works, Inc.", and the said *Bank paid said check without obtaining a genuine endorsement* of the *corporation,* "Richard Dye Works, Inc.", and that said *Bank paid said check on a forged endorsement* (R. 3a-7a).

2. *Plaintiffs' transaction with the corporation, "Richard Dye Works, Inc.".* On September 15, 1950, at Jermyn, Pennsylvania, Adams represented that he was the "president of the *corporation,* "Richard Dye Works, Inc.", and at the same time gave to plaintiff Cassell his business card bearing the name *"Richard Dye Works, Inc."* and the name "Raymond Adams, *President"* (Ex. "A", R. 47a, 24a). Adams, at that time, advised Cassell that the said *corporation,* "Richard Dye Works, Inc." was in need of a loan and negotiated on behalf of said *corporation* to make such loan from the plaintiffs (R. 24a-25a). Cassell, on behalf

of the plaintiffs, agreed to make a $1,500 loan to the *corporation,* "Richard Dye Works, Inc.", on condition that the said *corporation* execute a loan agreement and corporate note, which note was to be endorsed personally by Adams (R. 25a).

On September 15, 1950, at Jermyn, Pennsylvania, the *corporation,* "Richard Dye Works, Inc.", made, executed and delivered to Cassell the corporate loan agreement (Ex. "D", R. 52a) and corporate note (Ex. "C", R. 50a) endorsed personally by Adams, and at the same time Cassell issued plaintiffs' check payable to and intended for the *corporation,* "Richard Dye Works, Inc.", in the sum of $1,500 (Ex. "B", R. 48a, 25a). All of the above mentioned documents clearly show, and the inescapable conclusion is, that the plaintiffs were dealing with an alleged *corporate entity,* "Richard Dye Works, Inc.", in the belief that it was in existence, and that the plaintiffs' check was made payable to and intended for the alleged *corporate entity,* "Richard Dye Works, Inc.". This is fortified by the admission of Adams on his deposition:

> "Q. Now, when this transaction took place—namely, on or about September 15, 1950—whom did you represent, Mr. Adams? A. The Richard Dye Works, Inc." (R. 42a).

Cassell had no prior business relationship with Adams (R. 105). This is the only transaction plaintiffs had with the said alleged *corporation,* "Richard Dye Works, Inc." (R. 25a), and the loan was never repaid nor was any merchandise received by the plaintiffs under the loan agreement with the alleged corporation.

3. *Richard Dye Works, Inc. was never incorporated and had neither de jure nor de facto existence and was nonexistent.* Title 15 Pennsylvania Statutes, Business Corporation Law, Sec. 2852-206 provides that the articles of incorporation must be filed with the Department of State. The certificate of the Secretary of State of Pennsylvania

certifies that "Richard Dye Works, Inc.", is not a Pennsylvania corporation (Ex. "E", R. 53a). Adams in his deposition testified that said alleged *corporation,* "Richard Dye Works, Inc." was to have been incorporated under the laws of the State of Pennsylvania and reluctantly admitted that said alleged corporation, "Richard Dye Works, Inc.", *never was incorporated anywhere and that incorporation papers were not filed anywhere* (R. 37a-38a). Under these circumstances the alleged corporation, "Richard Dye Works, Inc.", had neither *de jure* nor *de facto* existence and was *non-existent.* The law is well settled in Pennsylvania, as it is in most jurisdictions, that as a *condition precedent* to the applicability of the doctrine of *de facto* corporation there must be *colorable compliance* with the incorporation statutes of Pennsylvania (*In re Gibbs Estate* (Penn), 27A. 383, 384), and both the District Court and the Court of Appeals properly so ruled in their opinions in holding that the alleged *corporation,* "Richard Dye Works, Inc.", was non-existent.

The Jermyn Bank was admittedly grossly negligent in opening and maintaining the corporate account of "Richard Dye Works, Inc.", without ever requesting, requiring or receiving corporate resolution of any kind (R. 23a) and admittedly will be responsible to the Federal Reserve Bank on its guarantee of prior endorsement.

4. *The proceedings below.* This action was originally brought by the plaintiffs in the Municipal Court of the City of New York against the National City Bank of New York, defendant. The National City Bank, as third-party plaintiff, impleaded the Federal Reserve Bank of New York, as third-party defendant, on its guarantee of prior endorsements on the check. The Federal Reserve Bank filed its petition and bond and removed this action to the District Court of the United States for the Southern District of New York pursuant to Section 15 of the Banking Act of 1933 (12 U. S. C. Sec. 632) and Section 1446 of Title 28 of the U. S. C.

Three motions for summary judgment were made in the District Court and heard simultaneously. Motion (1) plaintiffs moved for summary judgment against the National City Bank under Rule 56 of the Federal Rules of Civil Procedure (R. 21a-53a). This motion was granted and the National City Bank appealed from the order and judgment (R. 82a-83a). Motion (2) the National City Bank, as third-party plaintiff, moved *only* for summary judgment over against the Federal Reserve Bank contingent on the granting of plaintiffs' motion (R. 54a-55a). This motion was granted and the Federal Reserve Bank appealed from the *order, not from the judgment of the District Court,* granting motions (1) and (2) above (R. 80a-81a). The National City Bank did *not* move for summary judgment to dismiss plaintiffs' complaint. Motion (3) the Federal Reserve Bank moved for summary judgment to dismiss the complaints of the plaintiffs' and the National City Bank (R. 56a-69a). This motion was denied and the Federal Reserve Bank appealed from the *order, not from the judgment of the District Court,* denying its motion for summary judgment (R. 80a-81a). An *order* denying a motion for summary judgment is not a final decision and is not appealable. 28 U. S. C. Sec. 1291.

The Court of Appeals reversed the District Court and remanded the case with directions to enter judgment dismissing the complaint of the plaintiffs and the complaint of the National City Bank (R. 92).

A petition for rehearing was duly made by the plaintiffs (R. 93-117) and denied by the Court of Appeals (R. 118).

On the hearing of the motions in the District Court and on the hearing of the appeal in the Court of Appeals all parties agreed in their briefs that the law of Pennsylvania controls the case, and both the District Court and the Court of Appeals rendered their opinions based on the Pennsylvania law. Under these circumstances we will deem the law of Pennsylvania the law of this case in so far as this

petition for certiorari is concerned, even though we feel, as we urged in the petition for rehearing, that New York Law controls. (The law of New York and the law of Pennsylvania are identical in every detail as will be demonstrated in this petition under Point IV).

The opinion of the District Court clearly stated the undisputed facts and applied the law of Pennsylvania to those facts. As stated by Conger, D. J., in his opinion:

> "There is no genuine dispute of fact. Plaintiffs issued a check for $1,500 payable to 'Richard Dye Works, Inc.' in Jermyn, Pennsylvania. The check was in the nature of a loan to the 'Richard Dye Works, Inc.', which had been solicited by one Adams, 'president' of the 'Richard Dye Works, Inc.' The check was drawn on the defendant bank which deducted such amount from plaintiffs' account after the check had been received in the course of business from the third-party defendant who had in turn received it from First National Bank, Jermyn, Pennsylvania, where it had been deposited in the account of the 'Richard Dye Works, Inc.', by Adams. The Jermyn Bank and the third-party defendant guaranteed prior endorsement.
>
> "In fact, unknown to Adams, the plaintiffs, the Jermyn Bank, and the others, the 'Richard Dye Works, Inc.', was not a corporation at all, but was a nullity. It had a plant, but had not been incorporated, although Adams believed it had. A lawyer's oversight accounted for this, apparently" (R. 74a-75a).
>
> * * * * * *
>
> "Everyone agrees that the law of Pennsylvania controls. *Swift & Co.* v. *Bankers Trust Co.*, 280 N. Y. 135.
>
> "Section 28 of Title 56, Pennsylvania Statutes, which is the same as Section 23 of the Uniform Negotiable Instruments Law and Section 42 of the New York Negotiable Instruments Law, provides:
>
> " 'Where a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to en-

force payment thereof against any party thereto, can be acquired through or under such signature, unless the party, against whom it is sought to enforce such right, is precluded from setting up the forgery or want of authority.'

"Since the 'Richard Dye Works, Inc.' never was a corporation, Adams' endorsement was 'made without the authority of the person (corporation) whose signature it purports to be (and) is wholly inoperative.'

"In *Land Title Bank & Trust Co.* v. *Cheltenham Nat. Bank,* 362 P. 30, 66 A. (2d) 768, the Court said:

> " 'If a check is made payable to the order of a person named therein the absolute duty of a bank honoring the check is to pay only to that payee or according to his order, and no amount of care to avoid error will protect it from liability if it pays to a wrong person' (p. 770 of 66 A. 2d).

* * * * * *

"The affirmative defense of negligence on the part of the plaintiffs, asserted by the third-party defendant, is of no avail. The only kind of negligence which precludes the drawer of a check from recovery from a bank in a case of this type is negligence in respect to the preparation of the check itself, as for example where the check is drawn in such a manner that the name of the payee may be easily altered or where there have been left unfilled blanks or where there is some similar act of carelessness that facilitates the commission of the fraud by which the proceeds of the check are improperly obtained. Land Title case, *supra*" (R. 75a, 76a, 77a).

Conger, J., further said in his opinion:

"The so-called imposter rule, upon which the defendant and third-party defendant rely, is inapplicable. The rule applies only when a check is given to a person and intended for that person, but who assumed a false and fictitious name and the check is made payable to such false and fictitious name, but intended for that particular person.

"That is not the situation here. It is undisputed that plaintiffs at all times believed it was dealing with a corporation and the check was made payable to its order. See *Land Title* case, *supra,* at page 770 and cases cited therein" (R. 76a).

The Court of Appeals refused to follow the principle of law clearly stated in the case of *Land Title Bank & Trust Co.* v. *Cheltenham Nat. Bank, supra* (decided in 1949), and a long line of prior decisions which holds that when a check is made payable to the order of a person named therein the *absolute duty of a bank honoring the check is to pay only to that payee or according to his order upon a genuine endorsement,* and that no amount of care to avoid error will protect it if it pays to a wrong person. The Court of Appeals refused to follow that clear statement of the law laid down in those cases on the untenable ground that the cases "involved some fraud or the like" (R. 91, Ct. of Appeals opinion). The decision of *Land Title Bank & Trust Co.* v. *Cheltenham Nat. Bank, supra,* and the long line of prior decisions, are based on the *Negotiable Instruments Law* and on the *contractual obligation* of the bank to its depositor and not on fraud or misrepresentation. The refusal by the Court of Appeals to follow the aforesaid decisions of the highest court of Pennsylvania on matters pertaining to local law is in violation of 28 U. S. C. Sec. 1652 and contrary to the decision of this Court in the case of *Huddleston* v. *Dwyer,* 322 U. S. 232, 236. Furthermore, even under the wrong construction placed by the Court of Appeals on the Pennsylvania cases above cited that they "involved some fraud or the like", they would nevertheless apply to the instant case, since, it is uncontroverted that plaintiffs issued their check as a loan to and made payable to the *corporation,* "Richard Dye Works, Inc.", on the *misrepresentation by Adams that the said corporation was in existence.*

Questions Presented

1. Does not the Court of Appeals exceed its appellate office and jurisdiction in adjudicating and directing the District Court to dismiss a complaint, on an appeal by defendant from summary judgment in favor of a plaintiff, where the defendant did not move for summary judgment to dismiss plaintiff's complaint as required under Rule 56 of the Federal Rules of Civil Procedure? (This very question was before this Court in *Fountain* v. *Filson,* 336 U. S. 681 (1949). This Court left this question open and unanswered, having reversed that case on other grounds.)

2. Does not the Court of Appeals exceed its appellate office and jurisdiction under 28 U. S. C. Secs. 1291-1294 in entertaining the appeal of the Federal Reserve Bank (third-party defendant) from the *interlocutory order* denying its motion for summary judgment.

3. Does not the Court of Appeals exceed its appellate office under Rule 56(c) of the Federal Rules of Civil Procedure in directing a District Court to enter summary judgment when there is a genuine dispute of material fact?

4. Does not the Court of Appeals exceed its appellate office and authority and violate 28 U. S. C. Sec. 1652 and the decision of *Huddleston* v. *Dwyer,* 322 U. S. 232, 236, when it refuses to follow the decisions of the highest state court on matters pertaining to local law?

Reasons for Granting the Writ

This Court left open and unanswered in the case of *Fountain* v. *Filson et ux.,* 336 U. S. 681 (1949), the important question whether, under Rule 56, Federal Rules

of Civil Procedure, a cross-motion is necessary to permit an adjudication on the merits favorable to the party opposing a motion for summary judgment. A ruling by this Court is necessary to guide the courts below and the members of the bar.

If such a cross-motion is necessary, then the Court below was in error in directing the District Court to enter summary judgment dismissing plaintiffs' complaint. The Court below could not premise its judgment directing the District Court to enter summary judgment dismissing plaintiffs' complaint on the appeal by the Federal Reserve Bank from the *order* denying its motion for summary judgment. An *order* denying a motion for summary judgment is not a final decision and is not appealable (28 U. S. C. Sec. 1291).

The Court below departed from the well established federal law that a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure, cannot be granted when there is, as in this case, a genuine dispute of material fact. Federal courts have always been zealous not to deprive a party to a trial on a genuine dispute of material fact. The decision of the Court below contravenes both Rule 56 and the decision of this Court in *Fountain* v. *Filson et ux.*, 336 U. S. 681, 683.

The Court below refused to and did not follow the decisions of the highest court of Pennsylvania which clearly enunciated the principle of law that the *obligation of a bank honoring a check made to the order of a person named therein is to pay only to that payee or according to his order on a genuine endorsement; Land Title Bank & Trust Co.* v. *Cheltenham Nat. Bank,* 66 A. 2d 768, 770. Under 28 U. S. C. 1652 and the case of *Huddleston* v. *Dwyer,* 332 U. S. 232, 236, the Court below was duty bound to follow the decisions of the Courts of Pennsylvania on matters pertaining to local law. To permit the federal courts to have a different law than the state courts on matters pertaining to negotiable instruments would play havoc with the commercial world.

POINT I

The Court of Appeals lacked jurisdiction and authority to direct the District Court to dismiss plaintiffs' complaint on the appeal by the National City Bank.

The Court of Appeals could not adjudicate and direct summary judgment dismissing plaintiffs' complaint on the appeal by the National City Bank where no cross-motion for summary judgment was made by the National City Bank.

The plaintiffs moved for summary judgment against the National City Bank pursuant to Rule 56(a) of the Federal Rules of Civil Procedure. The National City Bank, as third-party plaintiff, moved for summary judgment over against the Federal Reserve Bank contingent on the granting of the plaintiffs' motion (R. 54a-55a). The National City Bank *did not* make any cross-motion for summary judgment to dismiss plaintiffs' complaint.

Federal Rules of Civil Procedure, Rule 56(a) provides the manner in which a plaintiff must move for summary judgment; Rule 56(b) provides the manner in which a defendant must move for summary judgment; and Rule 56(c) specifically provides that summary judgment may be granted to a *"moving party"*. Rule 56(c) is clear and leaves no doubt *that a party must move for summary judgment,* and Rule 56(a) and (b) provides in detail the manner for so moving by each party to an action (*Truvcale* v. *Blumberg et al.,* 8 F. R. D. 492). As stated by Medina, J., in his opinion:

> " * * * I cannot persuade myself that Rule 56 was intended to permit an adjudication on the merits favorable to the party opposing a motion for summary judgment, without a cross-motion. This view is confirmed by the circumstances that this very question of the necessity for a cross-motion received thoughtful consideration by the Advisory Committee at the time of the formulation of the amendments, which took effect in March if this year. The decision of the Advisory Committee that no change should be made, would seem

to be a clear indication that such relief should not be granted in the absence of a cross-motion. * * *" (pp. 492-493 of 8 F. R. D.).

If the above opinion of Medina, J., is a true statement of the law, then the Court of Appeals was without jurisdiction or authority to direct the District Court to enter summary judgment dismissing plaintiffs' complaint on the appeal of the National City Bank.

This very question was before this Court recently in the case of *Fountain* v. *Filson, et ux.*, 336 U. S. 681 (1949), and this Court left this question open and unanswered, having reversed that case on other grounds.

POINT II

The Court of Appeals lacked jurisdiction and authority to direct the District Court to dismiss plaintiffs' complaint on the appeal by the Federal Reserve Bank from the order denying its motion for summary judgment. Such an order is not a final decision and is not appealable under 28 U. S. C. Sec. 1291.

We will now consider the appeal of the Federal Reserve Bank. The Federal Reserve Bank made a motion in the District Court for summary judgment to dismiss plaintiffs' complaint. This motion was denied. The Federal Reserve Bank appealed from the *order* denying its motion (R. 80a-81a). The Federal Reserve Bank also appealed from the *order* granting plaintiffs' and the National City Bank's motions for summary judgment. The Federal Reserve Bank *did not appeal from the judgment.*

The Federal Reserve Bank is bound by its notice of appeal (R. 80a-81a), and the matters brought up for review on its appeal are limited and determined by its notice of appeal subject to the jurisdictional qualifications of the Court of Appeals under 28 U. S. C. 1291-1294. The Court

of Appeals jurisdiction and authority, if any, directing the District Court to enter summary judgment dismissing plaintiffs' complaint *must* be predicated on the appeal by the Federal Reserve Bank from the *order* of the District Court denying its motion for summary judgment to dismiss plaintiffs' complaint (see Point I above). An *order* denying a motion for summary judgment is not a final decision and the Court of Appeals lacked jurisdiction and authority to entertain the appeal by the Federal Reserve Bank from the *order* of the District Court denying its motion for summary judgment to dismiss plaintiffs' complaint (28 U. S. C. Sec. 1291); and the fact that this non-appealable order is joined with an appealable order does not give the Court of Appeals jurisdiction or authority to entertain the non-appealable order (*Atlantic Co.* v. *Citizens Ice & Cold Storage Co.*, 5th C., 178 F. 2d 453, 456; *Dutton et al.* v. *Citizens Service Defense Corp.*, 8th C., 197 F. 2d 458; *Drittel* v. *Friedman*, 2nd C., 154 F. 2d 653, 654). Having no jurisdiction or authority to entertain the appeal by the Federal Reserve Bank from the *order* denying its motion for summary judgment, the Court of Appeals could not review or reverse the *order* of the District Court denying the motion of the Federal Reserve Bank for summary judgment to dismiss plaintiffs' complaint and could not direct the District Court to enter summary judgment dismissing plaintiffs' complaint.

POINT III

The Court of Appeals exceeded its appellate office under Rule 56, Federal Rules of Civil Procedure, in directing the District Court to enter summary judgment to dismiss plaintiffs' complaint, since there is a genuine dispute of material fact.

The Court of Appeals cannot direct summary judgment under Rule 56 (C) of the Federal Rules of Civil Procedure when there is a genuine dispute of material fact (*Fountain*

v. *Filson et ux.*, 336 U. S. 681, 683; *Doehler Metal Furniture Co.* v. *United States*, 2nd C., 149 F. (2d) 130, 135, 136). This Court, in the recent case of *Fountain* v. *Filson et ux.*, *supra*, said:

> "* * * Summary judgment may be given, under Rule 56, only if there is no dispute as to any material fact * * *" (p. 683 of 336 U. S.).

In applying that rule of law to the instant case we must examine the affidavits, the documentary evidence and the depositions taken in this case and submitted on the three motions for summary judgment herein.

A

The affidavit of plaintiff Cassell who represented the plaintiffs in this transaction.

The affidavit of Cassell clearly and unequivocally shows that he issued plaintiffs' check payable to the *corporate entity*, "Richard Dye Works, Inc.", and intended for that *corporate entity* in the belief that it was an existing corporation. This check was in the nature of a loan to the said *corporation*, "Richard Dye Works, Inc.", which was solicited in behalf of that *corporation* by Adams its "president" (R. 24a-25a). The affidavit of Cassell sets forth in detail the facts of this transaction as follows:

> "The facts are simple. On September 15, 1950, at Jermyn, Pennsylvania, Raymond Adams told me that he was the President of the corporation, Richard Dye Works, Inc., and at the same time gave me his business card bearing the name of 'Richard Dye Works, Inc.' and the name 'Raymond Adams, President.' A photostatic copy of said business card is attached hereto marked 'Exhibit A' and made a part hereof. The original of this exhibit as well as all other exhibits attached hereto will be presented on the hearing of this motion. Raymond Adams, at that time, advised me that the said Richard Dye Works, Inc. was in need of a loan and asked me to make such loan on behalf of the

plaintiffs. Raymond Adams, in behalf of the Richard Dye Works, Inc., and I, on behalf of the plaintiffs, agreed that the plaintiffs was to lend the said corporation, Richard Dye Works, Inc., the sum of $1,500.00 and that to secure the repayment of said loan the said Richard Dye Works, Inc. was to execute a promissory note payable on demand in the same sum to the order of the plaintiffs, and that said note was to be endorsed personally by said Raymond Adams waiving presentment and notice of dishonor; and further that in consideration of the plaintiffs making said loan, the Richard Dye Works, Inc., was to sign an agreement whereby it agreed that the plaintiffs would get the remnants, seconds and excess piece goods from said Richard Dye Works, Inc. until the aforesaid note was paid.

"On September 15, 1950, at Jermyn, Pennsylvania, pursuant to the above agreement, I issued plaintiffs' check in the sum of $1,500.00 payable to the corporation, Richard Dye Works, Inc., a photostatic copy of which is annexed hereto, marked 'Exhibit B', and made a part hereof. At the same time Richard Dye Works, Inc. made the above mentioned note and endorsed personally by Raymond Adams, as aforesaid, and executed the above mentioned agreement on the stationery of the Richard Dye Works, Inc., photostatic copies of which are annexed hereto, marked 'Exhibit C' and 'Exhibit D' respectively, and made a part hereof. I then delivered the check to Raymond Adams for the corporation, Richard Dye Works, Inc. and simultaneously Raymond Adams delivered to me for the plaintiffs the note and agreement. Plaintiffs never received any repayment of said loan. This is the only transaction plaintiffs had with the said alleged corporation Richard Dye Works, Inc." (R. 24a-25a).

The documents and the depositions which will be discussed below confirm the averments made in the above mentioned affidavit of Cassell.

B

The documentary evidence.

1. *The corporate business card.* The corporate business card of Richard Dye Works, Inc. bears the names of "Richard Dye Works, Inc." and "Raymond Adams, President" (Ex. "A", R. 47a). Adams admitted in his deposition that he gave this business card to Cassell at the time of this transaction or before then (R. 39a).

2. *Plaintiffs' check.* Plaintiffs' check was made payable to "Richard Dye Works, Inc." (Ex. "B", R. 48a). Adams admitted in his deposition that he knew the check was issued to "Richard Dye Works, Inc." (R. 42a).

3. *The corporate loan agreement.* The corporate loan agreement of "Richard Dye Works, Inc." was executed on the stationery of that corporation and in which it acknowledged that the plaintiffs' loan aforesaid was a loan to that *corporation* (Ex. "D", R. 52a). Adams admitted in his deposition that he represented the alleged *corporation,* "Richard Dye Works, Inc.", in this transaction with the plaintiffs and that he acted in his alleged official capacity as *"president" thereof* (R. 39a-42a).

4. *The corporate note.* The corporate note of "Richard Dye Works, Inc.", endorsed personally by Adams, crystallizes and confirms the corporate loan agreement (Ex. "C", R. 50a). The fact that plaintiffs insisted upon "Adams" personal endorsement clearly indicates that plaintiffs distinguished between the principal obligor, the *corporate entity* "Richard Dye Works, Inc.", and "Adams", individually, as an endorser and guarantor of the loan.

C

The depositions.

Adams admitted in his deposition that he had no business relationship with Cassell since 1940 (R. 105).

The depositions of Cassell and Adams clearly show that Cassell was transacting his business with the *corporate entity,* "Richard Dye Works, Inc.", and that Adams was negotiating this loan in behalf of the alleged *corporate entity,* "Richard Dye Works, Inc."; that Adams represented the said *corporate entity,* "Richard Dye Works, Inc." in his alleged official capacity as "president" thereof, and that plaintiffs' check was made payable to the order of the *corporate entity,* "Richard Dye Works, Inc." and intended for that corporation in the belief that said *corporation,* "Richard Dye Works, Inc.", was in existence (R. 39a-42a, 105-106).

Adams admitted in his deposition that he represented the alleged *corporate entity,* "Richard Dye Works, Inc.", in his alleged official capacity thereof.

> "Q. Now, at the time when Mr. Cassell and you were negotiating this loan isn't it true that Mr. Cassell did business with the *Richard Dye Works, Inc.?* A. Did business?
>
> Q. Yes, for the purpose of this *negotiation.* A. *Yes, that's right.*
>
> Q. *Richard Dye Works, Inc.?* A. Yes" (R. 41a, Adams Deposition).
>
> * * * * * *
>
> "Q. Now, when this transaction took place—namely, on or about September 15, 1950—whom did you represent, Mr. Adams? A. The *Richard Dye Works, Inc."* (R. 42a, Adams Deposition).

Adams further admitted in his deposition that he knew the check was given to the *corporation,* "Richard Dye Works, Inc.", and that he too understood and knew that the check was *intended* for the *corporation,* "Richard Dye Works, Inc."

> "Q. Mr. Adams, when you received the same check which we are talking about, the check made payable to the Richard Dye Works, Inc., dated September 15, 1950, to whom did you believe it was made payable.

Mr. Giardino: Objection.

A. *To Richard Dye Works, Inc.*

Mr. Giardino: Objection. I want to find out whether you were trying to ascertain the intention of Mr. Cassell or the intention of Mr. Adams.

Mr. Cassell: Mr. Adams.

Q. To whom did Mr. Adams intend that check be credited? A. To *Richard Dye Works, Inc.*" (R. 42a, Adams Deposition).

The corporate loan agreement clearly shows that plaintiffs' check was issued as a loan to the alleged *corporate entity*, "Richard Dye Works, Inc.", and it is so acknowledged in that loan agreement, which reads in part as follows:

"In consideration of a fifteen hundred dollar loan made to the undersigned *corporation* this day by the *Elkay Textile Co.*, 467 Broadway, New York, New York * * *."

(signed) RICHARD DYE WORKS, INC.

Raymond Adams, Pres." (Ex. "D", R. 52a).

So that the affidavits, documents and the deposition herein clearly and unequivocally establish the fact that Cassell was transacting his business with an alleged *corporate entity*, "Richard Dye Works, Inc.", and that Adams was negotiating this loan in behalf of the alleged *corporate entity*, "Richard Dye Works, Inc."; that Adams represented the said alleged *corporate entity*, "Richard Dye Works, Inc", in his alleged official capacity as *"president"* thereof, and that plaintiffs' check was made payable to the *corporate entity*, "Richard Dye Works, Inc.", and intended for that *corporate entity* in the belief that said *corporation*, "Richard Dye Works, Inc.", was in existence.

The District Court, in its exhaustive opinion (R. 74a-77a), properly found that the above were the undisputed

facts and properly granted summary judgment in favor of the plaintiffs.

The Court of Appeals, in its decision, treated the *corporation,* "Richard Dye Works, Inc.", *as a* mere tag or name designating the business of "Adams", contrary to law, contrary to the clear understanding of all of the parties hereto, and contrary to the clear and unmistakable documentary evidence and the depositions taken herein. A corporation has a significant meaning in the commerical and legal worlds. A corporation is not a mere name or tag. A corporation is a *legal entity* created by law and is an *enterprise in its own right.* The unmistakable evidence herein is clear that plaintiffs were transacting their business with the *corporate enterprise* of "Richard Dye Works, Inc." and not with "Adams" individually or "Adams" doing business under the business firm name of "Richard Dye Works, Inc." There is not a scintilla of evidence to support the basis of the decision of the Court of Appeals that plaintiffs were doing business with "Adams" individually or "Adams" doing business under a business firm name. Adams admitted in his deposition, that throughout this transaction with the plaintiffs he represented the alleged *corporate entity,* "Richard Dye Works, Inc.", in his alleged capacity as *"president"* thereof (R. 39a-42a). Even if there was a scintilla of evidence to support the basis of the decision of the Court of Appeals that plaintiffs were doing business with "Adams" individually or "Adams" doing business under a business firm name, the Court of Appeals could not direct the District Court to enter summary judgment dismissing plaintiffs' complaint under Rule 56(c), Federal Rules of Civil Procedure, since there then would be a genuine dispute as to that material fact (*Fountain* v. *Filson, et ux, supra*).

POINT IV

The Court of Appeals refused to follow the well settled law of Pennsylvania, namely, that the obligation of a bank to its depositor in honoring a check made to the order of a person named therein is to pay only to that payee or according to his order on a genuine endorsement.

Under 28 U. S. C. Sec. 1652 it is the duty of the Court of Appeals to follow the decisions of the Pennsylvania Courts on matters pertaining to local law. This Court, in the case of *Huddleston* v. *Dwyer,* 322 U. S. 232, 236, said:

> "* * * It is the duty of the federal appellate courts, as well as the trial courts, to ascertain and apply the state law where, as in this case it controls * * *" (p. 236 of 322 U. S.).

This Court granted petitions for certiorari in the cases of *Wichita Royalty Co.* v. *City National Bank,* 305 U. S. 587 and *King* v. *Order of United Commercial Travelers of America,* 332 U. S. 754 in order to determine whether the court of appeals refused to follow state court's decisions.

A

The check herein is not a bearer check. Plaintiffs made check payable to the corporate entity, "Richard Dye Works, Inc.", in the belief that it was in existence.

It is undisputed that plaintiffs issued their check payable to and intended for the *corporate entity,* "Richard Dye Works, Inc.", in the belief that the corporation was in existence. The check was in the nature of a loan to that *corporate entity.* Plaintiffs, admittedly, did not know that the corporation was non-existent or fictitious and did not intend to make the check payable to a non-existent or fictitious payee. The law is well settled in Pennsylvania that when a check is made payable to a named payee in the

belief that such payee is in existence, such a check is *not* a bearer check under the Negotiable Instruments Law of Pennsylvania, Sec. 14, Title 56, Pennsylvania Statutes; the guiding consideration is the *intent of the drawer* of the instrument in inserting the name of the payee: *Bacher* v. *City Nat. Bank,* 31 A. 2d 725, 726, 347 Pa. 80, *Commonwealth* v. *Globe Ind. Co.,* 185 A. 796, 798, 799, 800, 323 Pa. 261. Such a check is not susceptible of a genuine endorsement: *Commonwealth* v. *Globe Ind. Co.,* 185 A. 796, 799, 323 Pa. 261.

B

The absolute duty of the National City Bank was to pay the check only to the corporate entity, "Richard Dye Works, Inc.", or according to its order on a genuine endorsement and to no one else.

It is well established law in Pennsylvania that the absolute duty of a bank to its depositor in honoring a check made payable to a person named therein is to pay *only to that payee or according to his order on a genuine endorsement,* and that no amount of care to avoid error will protect it from liability if it pays to a wrong person: *Land Title Bank & Trust Co.* v. *Cheltenham Nat. Bank et al.,* 66 A. 2d 768, 770, 362 Pa. 30, *Main Belting Co.* v. *Corn Exchange Nat. Bank & Trust Co.,* 188 A. 865, 867, 325 Pa. 168, *United Security Life Ins. Co. of Pennsylvania* v. *Central Nat. Bank,* 40 A. 97, 99, 185 Pa. 586.

In the leading and recent case of *Land Title Bank & Trust Co.* v. *Cheltenham Nat. Bank et al., supra* (decided in 1949) the Court said:

> "The applicable rule of law is so firmly settled that it needs no elaborate citation of authorities to support it. If a check is made payable to the order of a person named therein the absolute duty of a bank honoring the check is to pay only to that payee or according to his order, and no amount of care to avoid error will protect it from liability if it pay to a wrong person; it must ascertain and act on the genuineness of endorsement at its peril. * * *" (p. 770 of 66 A. 2d).

In the case of *Main Belting Co.* v. *Corn Exchange Nat. Bank & Trust Co., supra,* the Court said:

> "The *contract* between the bank and the plaintiff required the bank to pay plaintiff's checks to the payee designated by the plaintiff and *no one else,* save on the order of the payee * * * " (p. 867 of 188 A). (Italics ours.)

In the case of *United Security Ins. Co. of Pennsylvania* v. *Central Nat. Bank, supra,* the Court said:

> " * * * The referee rightly held that the *banker's contract* with his depositor is to pay the latter's checks *only* to the payee or one who claims through a genuine endorsement * * * " (p. 99 of 40 A). (Italics ours.)

The District Court, in an exhaustive opinion (R. 74a-77a), followed the above principle of law clearly enunciated in the above cited cases.

The Court of Appeals refused to follow the above principle of law clearly enunciated in the above cited cases on the ground that those cases "in one way or another, involved some fraud or the like" (R. 91, opinion Ct. of Appeals). This is error for two reasons. (1) Those decisions are based on the *Negotiable Instruments Law* and on the *contractual obligation of the bank to its depositor,* and those decisions were not based on fraud or misrepresentation in the slightest degree. (2) Assuming that the constructions placed by the Court of Appeals were correct, those cases would apply to the instant case, since "Adams" *misrepresented* the fact that the corporation, "Richard Dye Works, Inc.", was incorporated and in existence, and on which *misrepresentation* plaintiffs relied.

The exact problem arose recently before the Court of Appeals for the District of Columbia in the case of *Callaway* v. *Hamilton National Bank of Washington, et al.,* 195 F. 2d 556, 563 (1952) and in New York in the case of *International Aircraft Trading Co.* v. *Manufacturers Trust*

Co., 297 N. Y. 285, 291, 292, 79 N. E. 2d 249, 251. Both cases involved a non-existent corporate payee and the Courts applied the same principle of law as the Pennsylvania Courts and held the banks liable to the depositor.

C

The Court below erroneously applied the so-called "imposter" cases which have absolutely no application herein.

The Court of Appeals, instead of applying the law clearly laid down in the above cited cases, wrongly applied the principle of law which applies in the so-called "imposter" cases and cited the case of *Land Title & Trust Co.* v. *Northwestern Nat. Bank,* 46 A. 420, 196 Pa. 230. The so-called "imposter" cases have no application to the facts in the instant case. Adams was no imposter. Adams, admittedly, represented the *corporate entity,* "Richard Dye Works, Inc.", as agent, in his alleged official capacity as "president" of that corporation, in the dealings with the plaintiffs herein.

The Pennsylvania Supreme Court, in its opinion, in the very recent leading case of *Land Title Bank & Trust Co.* v. *Cheltenham Nat. Bank, supra,* specifically referred to the "imposter" case of *Land Title & Trust Co.* v. *Northwestern Nat. Bank, supra,* relied upon and cited in the decision of the Court of Appeals and distinguished them:

> "Defendant attempts to assimilate the present situation to the so-called 'imposter' cases [1] which hold that a bank is not liable for the payment of a check on a forged endorsement where the person who committed the forgery and received the money was in fact the

"[1] *Land Title & Trust Co.* v. *Northwestern National Bank,* 196 Pa. 230, 46 A. 420, 50 A. L. R. 75, 79 Am. St. Rep. 717; Land Title & Trust Co. v. Northwestern National Bank, 211 Pa. 211, 60 A. 723, 107 Am. St. Rep. 565; Market Street Title & Trust Co. v. Chelten Trust Co., 296 Pa. 230, 145 A. 848; North Philadelphia Trust Co. v. Kensington National Bank, 328 Pa. 298, 196 A. 14."

person to whom the drawer delivered the check *and whom he believed to be the payee named.* Here, however plaintiff did not intend or believe Bennewitt to be the payee; on the contrary, it believed that it was dealing with Vera Keller; the checks were made payable to her order and entrusted to Bennewitt merely for the purpose of delivery to her. * * * " (pp. 770, 771 of 66 A. 2d, italics in original report).

See also: *Commonwealth* v. *Globe Indemnity Co.,* 185 A. 796, 799, 800, 323 Pa. 261; *City Bank* v. *Hamilton Nat. Bank of Washington,* 108 F. 2d 588, 589.

The so-called "imposter" cases apply *only* when a check is given to *a person and intended for that person* but who assumed a name other than his true name and the check is made payable to that assumed name *but intended for that particular person.* This is not the case at bar.

In the instant case it is undisputed that plaintiffs did not intend or believe "Adams" to be the payee; on the contrary plaintiffs believed it was dealing with the *corporate entity,* "Richard Dye Works, Inc."; the checks were made payable to the order of that *corporation* under a loan agreement and note executed by that *corporation,* and the check was entrusted to "Adams" for the purpose of delivery to that *corporation.*

The District Court, in its opinion, correctly distinguished this case from the so-called "imposter" cases and said:

> "The so-called imposter rule, upon which the defendant and third-party defendant rely, is inapplicable. The rule applies only when a check is given to a person and intended for that person, but who assumed a false and fictitious name and the check is made payable to such false and fictitious name, but intended for that particular person.
>
> "That is not the situation here. It is undisputed that plaintiffs at all times believed it was dealing with a corporation and the check was made payable to its order. See Land Title case, supra at page 770 and cases cited therein" (R. 76a) (reference p. 770 of 66 A 2d).

The so-called "imposter" case of *Land Title & Trust Co.* v. *Northwestern National Bank,* 46 A. 420, 196 Pa. 230, cited and relied upon by the Court of Appeals below has absolutely no application to the facts in the instant case, and the Court of Appeals should have affirmed the decision and judgment of the District Court.

D

There could not be any ratification of any act by the *corporate entity*, "Richard Dye Works, Inc.", since it never was incorporated.

The Court, in the case of *Callaway* v. *Hamilton National Bank of Washington, et al., supra,* reversed the order of the District Court, which granted defendant's motion for summary judgment dismissing plaintiff's complaint, and remanded the case for trial. The Court said:

> "A final argument merits brief attention. It is that appellant has no complaint here because the proceeds of the checks, said to be appropriated by the Hoeksemas, went to the very person intended to receive them. This contention, of course, overlooks the fact that appellant chose to surround the transaction with the protection of the corporate form and consciously made the corporation his payee. His intent was that the corporation receive the funds and his object was that they benefit the furniture business. Both purposes were frustrated. The case would be different had the proceeds, or part of them, actually been spent for business purposes. Compare *International Aircraft Trading Co.* v. *Manufacturers Trust Co.,* 297 N. Y. 285; 79 N. E. 2d 249, with *Alent* v. *Bank of the United States,* 131 Misc. 370, 226 N. Y. S. 653. But that is not the situation presented by this record" (p. 563 of 195 F. 2d).

The Court below completely misconstrued the dictum in the above decision (R. 91, Ct. of Appeals opinion). When the Court in the *Callaway* case, *supra,* used the words "furniture business" and "business purposes" it had reference

to and was talking about "corporate furniture business" and "corporate business purposes"; the Court there was considering the question of "ratification" by the corporation of acts done prior to the incorporation—and compared the cited cases *International Aircraft Trading Co., supra,* and the *Alent* case, *supra.* A reading and comparing of those cases will disclose that in the *International Aircraft Trading Co.* case, the Court held that there was no ratification because the money was not used for "corporate purposes" (p. 293 of 297 N. Y., p. 252 of 79 N. E. 2d). In the *Alent* case, the Court held that there was a ratification because the money actually came into the possession of the corporation as soon as it became incorporated and was used for corporate purposes (p. 656 of 226 N. Y. S., p. 372 of 131 Misc.). In the instant case, this question of ratification is not and cannot be present because, "Richard Dye Works, Inc.", admittedly, *never was incorporated,* and manifestly there could be no ratification by a corporation which never existed nor could any money be spent for "corporate business purposes." The Court below completely misconstrued the dictum in the *Callaway* case, *supra.*

E

Plaintiffs suffered damage by the wrongful payment of the check and the wrongful charging of plaintiffs' account therewith by the National City Bank.

The Indiana case of *Shank* v. *People State Bank,* 7 N. E. 2d 46, 104 Ind. 443, cited in the Court of Appeals decision below, has no application to the facts in the instant case. The facts in that case are wholly different from the facts in the instant case and the cases of *Callaway, supra,* and *International Aircraft Trading Co., supra.* On the question of law, that Court agreed with the aforesaid cases and held that the purported endorsement of a corporation not in existence is *not a valid endorsement and is a forgery* (p. 52 of 7 N. E.).

The Indiana Court based its entire decision solely on the peculiar facts of that case, that factually plaintiff suffered no damage by the wrongful payment of the checks. In that case the plaintiff entered into a contract with one "Coates" whereby he agreed to purchase certain machines from "Coates" and obligated himself to make certain payments to "Coates". When these payments became due, at the request of "Coates" and to accommodate "Coates", plaintiff, instead of making the checks payable to "Coates", to which "Coates" was entitled under the contract, made the checks payable to "Brownette Refrigeration Corporation". "Coates" actually received the payment of these checks from the bank. The Indiana Court held that plaintiff, at the time of the delivery of the checks, intended to pay and discharge his obligation due and owing "Coates" under the contract and that the money actually reached "Coates", and that the plaintiff did not suffer any damage by the forgery. The Court said:

> "* * * We think, in this case, that there was ample evidence to support the finding of the Court that at the time of delivery of each of said checks in question by appellant to Coates *appellant intended to pay and discharge the obligation due and owing by him to the said Coates,* as described in the written contracts between appellant and Coates, * * * and that the *amounts actually reached the person entitled to them and to whom the sums were payable*" (p. 52 of 7 N. E.). (Italics ours.)

It is clear from the above quoted opinion that the decision of the Indiana Court was based under the peculiar facts of that case that factually the plaintiff suffered no damage by the bank's wrongful payment of the checks. The name of "Brownette Refrigeration Corporation" was inserted as payee as an accommodation to "Coates" who was entitled to the checks; the same result would obtain if any other name was inserted. The name of the payee was immaterial to the plaintiff. The plaintiff's intent was

to pay "Coates" the money due him under the contract and to discharge his obligation to "Coates" under the contract: both purposes were served and plaintiff sustained no damage by the banker's wrongful payment of the check.

The facts in the instant case and in the cases of *Callaway* v. *Hamilton National Bank of Washington, supra,* and *International Aircraft Trading Co.* v. *Manufacturers Trust Co., supra,* are wholly different than the facts in the Indiana case. In the instant case and in the cases of *Callaway* v. *Hamilton National Bank of Washington, supra,* and *International Aircraft Trading Co.* v. *Manufacturers Trust Co., supra,* the plaintiffs were contracting and dealing directly with the *corporate entity* and intended the proceeds of the check for the *corporate entity* which proceeds the *corporate entity did not receive.*

In the instant case, plaintiffs issued their check, which plaintiffs intended as a loan to the *corporate entity,* "Richard Dye Works, Inc.", and plaintiffs intended that the *corporate entity,* "Richard Dye Works, Inc.", receive the proceeds of the check; both purposes were frustrated, and manifestly the plaintiffs suffered damage by the bank's wrongful payment of the check and deducting the amount from plaintiffs' account. If the National City Bank had issued its check as a loan to the "Richard Dye Works, Inc." under similar circumstances, could it be argued, that the Bank would suffer no damage by the wrongful payment of its check? Plaintiffs are entitled to the equal and same protection of the law. The check was wrongfully paid and the amount wrongfully deducted from plaintiffs' account by the National City Bank to the plaintiffs' damage in the sum of $1,500, no part of which was ever recovered by the plaintiffs from any source.

CONCLUSION

For all of the reasons herein stated, we respectfully urge that substantial justice for the petitioners justifies the granting of this petition for certiorari.

Dated, May 22, 1953.

Respectfully submitted,

JACOB E. HELLER,
Attorney for Petitioners.

APPENDIX

Text of Statutes Relied On

Title 28 U. S. C.

Sec. 1291. FINAL DECISION OF DISTRICT COURTS.

The courts of appeals shall have jurisdiction of appeals from all *final decisions* of the district courts of the United States * * *.

Sec. 1652. STATE LAWS AS RULES OF DECISION.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decisions in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944.

Federal Rules of Civil Procedure

Rule 56. SUMMARY JUDGMENT.

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for summary judgment in his favor upon all or any part thereof. (As amended Dec. 27, 1946, effective March 19, 1948.)

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or

without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceedings Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is *no genuine issue as to any material fact* and that the *moving party* is entitled to a judgment as a matter of law. * * * (As amended Dec. 27, 1946, effective March 19, 1948.)

Title 15 Pennsylvania Statutes, Business Corporation Law

Sec. 2852-206. FILING OF ARTICLES; CERTIFICATE OF INCORPORATION.

(a) The incorporators *shall deliver, or cause to be delivered,* to the Department of State the articles of incorporation and proof of the advertisement required by the preceding section. If the Department of State finds that the articles conform to law, it shall forthwith, but not prior to the day specified in the advertisement required by the preceding section, endorse its approval thereon, and when all bonus, fees, and charges have been paid, as required by law, shall file the articles and issue to the incorporators, or their representative, a certificate of incorporation, to which shall be attached a copy of the approved articles. The articles, upon being approved and filed by the Department of State, shall constitute the charter of the corporation.

Title 56 Pennsylvania Statutes, Negotiable Instruments Law

Sec. 14. WHEN INSTRUMENT IS PAYABLE TO BEARER:

* * * * * *

3. When it is payable to the order of a fictitious or non-existing person, *and such fact was known to the person making it so payable;* or

Sec. 28. EFFECT OF FORGED OR UNAUTHORIZED SIGNATURE.

When a signature is forged or made without authority of the person whose signature it purports to be, it is wholly inoperative, and no right to retain the instrument, or to give a discharge therefor, or to enforce payment thereof against any party thereto, can be acquired through or under such signature, unless the party against whom it is sought to enforce such right is precluded from setting up the forgery or want of authority.